advised in the premises, finds: That the judgment of the lower court herein should be affirmed, at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the court, that the decision of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiffs in error. And exception is allowed.

Opinion by Pancoast, J. All the justices concurring except Burford, C. J., who tried the cause below, not sitting.

Which opinion reads in words and figures as follows, to wit:

273 In the Supreme Court of the Territory of Oklahoma, June Term, 1904.

Filed September 2, 1904.

U. C. Guss, J. W. McNeal, W. H. Gray, and Frank H. Greer, Plaintiffs in Error,
vs.
J. T. Nelson, Defendant in Error.
} No. 1394.

Syllabus.

1. Optional contract—Rescission—Notice under—Duty to return property.—Where a contract is entered into at Guthrie, Oklahoma, for the purchase of certain shares of stock of various mining companies with offices and place of business at Fort Scott, Kansas, the contract providing that it includes the delivery of the seals and all other records belonging to each of the companies, and a payment of $500.00 is made on the purchase price, which payment is to be considered as an option on all of said property until the fourth day of March, 1901, at which date the parties are to pay the vendor an additional sum of $4500.00, or in lieu thereof, turn back to the vendor all the property delivered by him, *Held*, that in case the purchasers elect to rescind and turn back to the vendor the property purchased, under the option given them, in order to entitle them to the benefit of such option, they must notify the vendor within the time given of their election, and must return or offer to return all the property, certificates of stock and records which were received by them.
2. Return of property not sufficient, when.—Where such contract is entered into, and the purchasers, on the day prior to the expiration of their option, at a meeting held in Guthrie, decided among themselves to rescind, and although they knew the address of the vendor, because of the vendor not being a resident of the Territory of Oklahoma or having a place of business in the city of Guthrie, placed the certificates of stock in the Guthrie national bank subject to the order of the vendor, and thereafter placed to his credit in such bank all the in-

come received from the royalties of the property, *Held*, not to be a compliance with the terms of the contract of rescission and return of property, which contract provided that in case the purchasers should elect to rescind they should "turn back to the vendor all the property delivered by him."

3. Oral opinion no part of record.—Where at the conclusion of a trial had before the court without a jury, the court orally reviews the evidence and expresses its opinion upon the law and the facts involved in the case, and where there are no special findings of fact and conclusions of law asked for, and where the findings and judgment of the court are embodied in a journal entry, the oral opinion expressed by the court performs no office in a case made, and cannot be considered by this court on appeal from a judgment of the trial court.

Error from the District Court of Logan County—Jno. H. Burford, Trial Judge—Affirmed.

John D. De Bois and Cotteral & Hornor, for plaintiffs in error.
W. R. Biddle, George S. Green and Selwyn Douglas, for defendant in error.

Opinion of the court by PANCOAST, J.:

Action commenced in the district court of Logan county by the defendant in error against the plaintiffs in error to recover the sum of $4500.00 upon the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation, to wit: Sapulpa, Choctaw Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tusa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal.

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500.00 (four thousand five hundred dollars) or in lieu thereof to turn back to said Nelson all the
274 property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforesaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn

over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa	1210 shares	Neyaka	368 shares
Choctaw	369 shares	Concharty	369 shares
Catoosa	369 shares	Tulsa	319 shares
Wewoka	369 shares	Car Creek	368 shares
Red Fox	369 shares	Broken Arrow	369 shares

"The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

U. C. GUSS.
W. H. GRAY.
J. W. McNEAL.
F. H. GREER.
J. T. NELSON."

The record shows that under this contract Nelson shipped the property described in the contract by express from Fort Scott, Kansas, where the headquarters of the company were, to Guthrie, all the parties being at Guthrie at the time the contract was signed, the residence of Nelson, however, being either at Fort Smith, Arkansas, or Fort Scott, Kansas, the right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, and therefore, under the contract, were bound to pay the remainder of the contract price of $4500.

The defendants' answer to the petition was, first, a general denial; second, that the defendants had elected to turn the property back to the plaintiff prior to the date of the expiration of the option March 4, 1901, and had tendered the same back to the plaintiff; third, that the plaintiff had induced the defendants to enter into the contract through fraudulent misrepresentations; and fourth, that there was no consideration for the contract. The trial was to the court without a jury. The findings of fact were general, and were in favor of the plaintiff below. The findings contained in the journal entry of judgment are in the following language:

"And the court, after hearing all of the evidence and arguments of counsel and being fully advised in the premises, finds for the plaintiff on all of the issues in this action and finds that the defendants and each of them are indebted to said plaintiff upon the contract sued upon and set out in this petition in the sum of four thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from the fourth day of March A. D. 1901, and that the plaintiff is entitled to judgment against the said defendants therefor."

Under this finding, every question of fact necessary to be found and upon which the judgment is based is in favor of the plaintiff in the action; and, following the rule so frequently laid down and universally adhered to by this court that where there is evidence upon which a finding of fact may be based, this court will not disturb the finding unless it is manifestly wrong, we might very properly affirm this case without further discussion.

However, some of the legal questions arising in the trial of the case below, and discussed in the briefs in this case are so interesting, together with the fact that a considerable amount is involved, we think it may be well to notice some of the propositions contended for more in detail.

First, we think it proper to call attention to a question of practice that seems to be growing among certain members of the profession in the Territory of inserting into a case-made matters of no importance, and which cannot be considered by this court. This practice serves only to make records more voluminous than they should be, and to add to this court's labor. The record in this case is not a large one, but it contains the oral decision of the court below
275 when rendering its decision at the trial. This court, as well as the supreme court of Kansas from which we take our civil procedure act, has repeatedly held that the oral decisions of the trial court have no office in a case-made, should not be included, and cannot be considered by the appellate court, when the finding and judgment of the court below are properly formulated into a record or written order.

In this case, the findings of fact and conclusions of law of the court below are contained in the journal entry. The oral decision of the judge at the conclusion of the trial cannot be considered by this court in any way.

Notwithstanding this, the argument of counsel for plaintiffs in error is based almost entirely upon the oral statements of the trial court and it is insisted that the court made no findings upon certain propositions, and that therefore this court is not obliged to reverse the trial court's findings in order to arrive at a conclusion as to certain of the facts contended for. These contentions of the plaintiffs in error could not possibly avail anything, because this court is bound to look to the findings of fact as contained in the journal entry. A case-made should properly contain nothing but that which is necessary to enable the appellate court to pass upon the questions involved on appeal.

Every question of fact under the general finding in this case is against the plaintiffs in error. Had they desired special findings might have been made, and in such event, the questions contended for and discussed in the briefs might have been properly presented to this court, if the special findings so warranted.

The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract,

the plaintiffs in error or some of them, owned certain interests in these companies or some of them, and desired to obtain a controlling interest, and in order to do so, contracted to purchase a certain amount of the stock from the defendant in error which would give them control of the property and of the company. Included in the contract for the purchase of stock was a provision for the resignation of the defendant in error as director, the transfer of the books, papers, records and seals of the companies, and the election of new directors. Some of the plaintiffs in error at the time of the contract were holding positions as officers of the company, and were familiar with the place where the business of the company was transacted, and where the records were kept.

Now, to take up the first issue raised by the answer, "that the defendants had elected to turn said property back to the plaintiff prior to the fourth day of March, 1901, and had tendered the same back to the plaintiff," all questions of fact involved in this issue were decided by the court below in favor of the defendant in error, and there being evidence sufficient upon which to base such a finding, this court, under the rule hereinbefore mentioned, will not disturb the same. We will, however, again refer to this issue later on.

The second issue raised by the answer, that plaintiff had induced the defendants to enter into said contract by fraudulent representations, and the third, that there was no consideration for the contract, were also issues found against the plaintiffs in error by the trial court, and we think very properly so.

A right to repudiate a contract on the ground of fraud is not a right arising out of the terms of the contract itself, but is one accruing to the parties under the law, separate and apart from any condition named in the contract. In order that the plaintiffs in error might have availed themselves of this legal right, they should have, within a reasonable time after the discovery of the fraud, given to Nelson notice of the disaffirmance or rescission of the contract; that is, in some way have communicated to Nelson their election to rescind, and they should also have restored or offered to restore everything of value that they had received under the contract.
276 They could not rescind in part. The rescission must have been of the entire contract. They could not be allowed to rescind the contract and to retain any of the benefits derived therefrom. Nelson should have been put in *statu quo*.—American & English Enc. of Law, 2nd ed.; vol. 24, p. 645, and cases there cited.

There is no pretence that they had performed any of the requirements of the law in this regard. In the first place, the court's findings of fact are against this proposition; that is, that there was no fraud or fraudulent statements or misrepresentations on the part of Nelson. The record does not disclose that any claim of fraud was made until the filing of the answer. No notice is shown to have been given that they had rescinded the contract upon this ground. No effort or attempt was made to return the property or any part of it on this theory; but on the contrary, even up to the trial and

during the trial, the benefits accruing to the plaintiffs in error, they claimed the right to retain. As stated before, the rights of the parties arising under this head are separate and apart from anything contained in the contract itself, and if under the terms of the contract, the plaintiffs in error would be entitled to retain the benefits arising under the contract, that is, the income from the royalties, they would not be entitled to retain such benefits if they rescinded the contract upon the ground of fraud. In such case, they would be required to return everything received, including the royalties, and would be entitled to recover the $500.00 earnest money originally paid, together with proper damages, if any had accrued.

Upon the proposition that there was no consideration for the contract, little need be said. In order to entitle one to defend against a contract on the ground of a failure of consideration, the evidence must show something more than inadequacy of consideration. When, as in this case, the evidence shows that the parties seeking to rescind have enjoyed an income from the property, they are not entitled to rescind. The evidence in this case entirely fails to show a failure of consideration. There is no statement of any witness who testified that the property was entirely without value, while on the other hand, the evidence shows that during the nine months covering the period of the option of plaintiffs in error, they had received as their share an income from the property in the sum of about $500.00, and in addititon thereto, prior to the trial, a further sum of over $300.00. How can it be said that a property producing an income of over $800.00 in a year was wholly without value? This would be about sixteen per cent. on the investment, an amount that ordinarily would be considered a sufficient income on an investment, by the average financier.

Returning to the first defense (that the plaintiffs in error had elected to return the property prior to the fourth day of March, 1901, and had tendered the same back) notwithstanding the allegations of the answer that they had tendered the property to the defendant in error, and notwithstanding the finding of the court against them on the question of fact involved in this contention, the plaintiffs in error contend that under the law they were not required to return the property, or even to give notice of the fact that they had elected to avail themselves of their option and rescind the contract. This really is the most interesting proposition contended for by plaintiffs in error. The evidence on the part of the plaintiffs in error shows that on the third day of March, 1901, the day before their right to rescind expired they held a meeting among themselves and elected to rescind; that they instructed Mr. De Bois their attorney, to notify the defendant in error of their election. A very few days prior to this they had received a letter from the defendant in error, in which he stated that he would hold them to a strict compliance with the contract; that if they did rescind within the time provided in the contract, they should return him the property, and directed that they return it to Fort Smith, Arkansas.

appeal being taken from an opinion rendered in said cause in the Supreme Court of the Territory of Oklahoma, which is in words and figures as follows, to-wit:

Supreme Court of Oklahoma. Sept. 2, 1904.

GUSS et. al. v. NELSON.

OPTIONAL CONTRACT — RESCISSION — NOTICE — RETURN OF PROPERTY — RECORD ON APPEAL.

1. Where a contract is entered into at Guthrie, Okla., for the purchase of certain shares of stock of various mining companies with offices and place of business at Ft. Scott, Kan., the contract providing that it includes the delivery of the seals and all other records belonging to each of the companies, and a payment of $500 is made on the purchase price, which payment is to be considered as an option on all of said property until the 4th day of March, 1901, at which date the parties are to pay the vendor an additional sum of $4,500, or in lieu thereof turn back to the vendor all the property delivered by him, *held* that, in case the purchasers elect to recind and turn back to the vendor the property purchased under the option given them, in order to entitle them to the benefit of such option, they must notify the vendor within the time given of their election, and must return or offer to return all the property, certificates of stock, and records which were received by them.

2. Where such contract is entered into, and the purchasers on the day prior to the expiration of their option, at a meeting held in Guthrie, decided among themselves to rescind, and although they knew the address of the vendor, because of the vendor not being a resident of the territory of Oklahoma or having a place of business in the city of Guthrie, placed the certificates of stock in the Guthrie National Bank subject to the order of the vendor, and thereafter placed to his credit in such bank all the income received from the royalties of the property, *held*, not to be a compliance with the terms of the contract of rescission and return of property, which contract provided that, in case the purchasers should elect to rescind, they should "turn back to the vendor all the property delivered by him."

3. Where at the conclusion of a trial had before the court without a jury the court orally reviews the evidence and expresses its opinion upon the law and the facts involved in the case, and where there are no special findings of fact and conclusions of law asked for, and where the findings and judgment of the court are embodied in a journal entry, the oral opinion expressed by the court performs no office in a case-made, and cannot be considered by this court on appeal from a judgment of the trial court.

(Syllabus by the Court)

Error from District Court, Logan County; before Justice Jno. H. Burford.

Action by J. T. Nelson against U. C. Guss and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John D. De Bois and Cotteral and Horner, for plaintiff's in error. W. R. Biddle, George S. Green. and Selwyn Douglas, for defendants in error.

PANCOAST, J. Action commenced in the district court of Logan County by the defendant in error against the plaintiffs in error to recover the sum of $4,500 upon the following contract:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to wit, as follows: J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation. to wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Car Creek and Broken Arrow Mining Companies, to the following persons: U. C. Guss. W. H. Gray, F. H. Greer and J. W. McNeal.

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows: This also includes the delivery of the records belonging to each of said above named companies, the seals

and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March. 1901. At that date the above named parties are to pay to Nelson an additional sum of $4.500.00 (Four thousand five hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforosaid, which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa	1,210 shares
Choctaw	369 shares
Catoosa	369 shares
Wewoka	369 shares
Red Fork	369 shares
Neyaka	368 shares
Concharty	369 shares
Tulsa	319 shares
Car Creek	368 shares
Broken Arrow	369 shares

"The $500.00 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

J. T. Nelson

"U. C. Guss
"W. H. Gray,
"J. W. McNeal,
"F. H. Greer,"

The record shows that under this contract Nelson shipped the property described in the contract by express from Ft. Scott, Kan., where the headquarters of the company were, to Guthrie, all the parties being at Guthrie, at the time the contract was signed, the residence of Nelson, however, being at either Ft. Smith, Ark., or Ft. Scott, Kan., the right of the plaintiff below to recover being based upon the theory that the defendants below had failed to turn back to Nelson the property delivered to them, and therefore under the contract, were bound to pay the remainder of the contract price of $4,500.

The defendants' answer to the petition was, first, a general denial; second, that the defendants had elected to tnrn the property back to the plaintiff prior to the date of the expiration of the option March 4, 1901, and had tendered the same back to the plaintiff; third, that the plaintiff had induced the defendants to enter into the contract through fraudulent misrepresentations; and, fourth, that there was no consideration for the contract. The trial was to the court without a jury. The findings of fact were general, and were in favor of the plaintiff below. The findings contained in the journal entry of judgment are in the following language: "And the court, after hearing all of the evidence and arguments of counsel, and being fully advised in the premises, finds for the plaintiff on all of the issues in this action, and finds that the defendants and each of them are indebted to said plaintiff upon the contract sued upon and set out in this petition in the sum of four thousand five hundred dollars, with interest thereon at the rate of seven per cent. per annum from the 4th day of March, A. D. 1901, and that the plaintiff is entitled to judgment against the said defendents therefor." Under this finding, every question of fact necessary to be found and upon which the judgment is based is in favor of the plaintiff in the action; and

following the rule so frequently laid down and universally adhered to by this court that, where there is evidence upon which a finding of fact may be based, this court will not disturb the finding unless it is manifestly wrong, we might very properly affirm this case without further discussion. However, some of the legal questions arising in the trial of the case below and discussed in the briefs in this case are so interesting, together with the fact that a considerable amount is involved, we think it may be well to notice some of the propositions contended for more in detail.

First, we think it proper to call attention to a question of practice that seems to be growing among certain members of the profession in the territory of inserting into a case-made matters of no importance, and which cannot be considered by this court. This practice serves only to make records more voluminous than they should be, and to add to this court's labor. The record in this case is not a large one, but it contains the oral decision of the court below when rendering its decision at the trial. This court, as well as the Supreme Court of Kansas, from which we take our civil procedure act, has repeatedly held that the oral decisions of the trial court have no office in a case-made, should not be included, and cannot be considered by the appellate court, when the finding and judgment of the court below are properly formulated into a record or written order. In this case the findings of fact and conclusions of law of the court below are contained in the journal entry. The oral decision of the judge at the conclusion of the trial cannot be considered by this court in any way. Notwithstanding this, the argument of counsel for plaintiff's in error is based almost entirely upon the oral statements of the trial court, and it is insisted that the court made no findings upon certain propositions, and that, therefore, this court is not obliged to reverse the trial court's findings in order to arrive at a conclusion as to certain of the facts contended for. These con-

tentions of the plaintiffs in error could not possibly avail anything, because this court is bound to look to the findings of fact as contained in the journal entry. A case-made should properly contain nothing but that which is necessary to enable the appellate court to pass upon the questions involved on appeal. Every question of fact under the general finding in this case is against the plaintiffs in error. Had they desired, special findings might have been made, and in such event the questions contended for and discussed in the briefs might have been properly presented to this court, if the special findings so warranted. The uncontradicted evidence shows that this contract was for the purchase of certain mining stocks of coal companies operating or to be operated in the Indian Territory. At the time of the contract the plaintiffs in error, or some of them, owned certain interests in these companies, or some of them, and desired to obtain a controlling interest, and in order to do so contracted to purchase a certain amount of stock from the defendant in error, which would give them control of the property and of the company. Included in the contract for the purchase of stock was a provision for the resignation of the defendant in error as director, the transfer of the books, papers, records, and seals of the companies, and the election of new directors. Some of the plaintiffs in error at the time of the contract were holding positions as officers of the company, and were familiar with the place where the business of the company was transacted and where the records were kept.

Now, to take up the first issue raised by the answer, "that the defendants had elected to turn said property back to the plaintiff prior to the 4th day of March, 1901, and had tendered the same back to the plaintiff." All questions of fact involved in this issue were decided by the court below in favor of the defendant in error, and, there being evidence sufficient upon which to base such a finding, this court un-

der the rule hereinbefore mentioned, will not disturb the same. We will, however, again refer to this issue later on.

The second issue raised by the answer, that plaintiff had induced the defendants to enter into said contract by fraudulent representations, and the third, that there was no consideration for the contract were also issues found against the plaintiffs in error by the trial court, and, we think, very properly so. A right to repudiate a contract on the ground of fraud is not a right arising out of the terms of the contract itself, but is one accruing to the parties under the law, separate and apart from any condition named in the contract. In order that the plaintiffs in error might have availed themselves of this legal right, they should have, within a reasonable time after the discovery of the fraud, given to Nelson notice of the disaffirmance or rescissiou of the contract; that is, in some way have communicated to Nelson their election to rescind, and they should also have restored or offered to restore everything of value that they had received under the contract. They could not rescind in part. The rescission must have been of the entire contract. They could not be allowed to rescind the contract and to retain any of the benefits derived therefrom. Nelson should have been put in statu quo. American & English Enc. of Law (2nd Ed.) vol. 24, p. 645, and cases there cited. There is no pretense that they had performed any of the requirements of the law in this regard.

In the first place, the court's findings of fact are against this proposition; that is, that there was no fraud or fraudulent statements or misrepresentations on the part of Nelson. The record does not disclose that any claim of fraud was made until the filing of the answer. No notice is shown to have been given that they had rescinded the contract upon this ground. No effort or attempt was made to return the property, or any part of it, on this theory; but, on the

contrary, even up to the trial and during the trial the benefits accruing to the plaintiffs in error they claimed the right to retain. As stated before, the rights of the parties arising under this head are separate and apart from anything contained in the contract itself, and if, under the terms of the contract, the plaintiffs in error would be entitled to retain the benefits arising under the contract—that is, the income from the royalties—they would not be entitled to retain such benefits if they rescinded the contract upon the ground of fraud. In such case they would be required to return everything received, including the royalties, and would be entitled to recover the $500 earnest money originally paid, together with proper damages, if any had accrued. Upon the proposition that there was no consideration for the contract, little need be said. In order to entitle one to defend against a contract on the ground of a failure of consideration, the evidence must show something more than inadequacy of consideration. When, as in this case, the evidence shows that the parties seeking to rescind have enjoyed an income from the property, they are not entitled to rescind. The evidence in this case entirely fails to show a failure of consideration. There is no statement of any witness who testified that the property was entirely without value, while, on the other hand, the evidence shows that during the nine months covering the period of the option of plaintiffs in error, they had received as their share an income from the property in the sum of about $500, and, in addition thereto, prior to the trial, a further sum of over $300. How can it be said that a property producing an income of over $800 in a year was wholly without value? This would be about 16 per cent. on the investment, an amount that ordinarily would be considered a sufficient income on an investment by the average financier.

Returning to the first defense (that the plaintiffs in error had elected to return the property prior to the 4th day of

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER, 1904, TERM.

U. C. GUSS, J. W. McNEAL, W. H. GRAY and FRANK H. GREER,

Appellants,

VS.

J. T. NELSON,

Appellee.

No.

NOTICE

To Green and Martin, Attorneys for Appellee in the Above Cause.

You are hereby notified that on Monday, the 6th day of February, 1905, the appellants will submit to the Supreme Court of the United States the foregoing motion for certiorari and diminution of the record, and for an order

asked for upon the Supreme Court of the Territory of O
homa, and the said motion will be submitted at the Ca
in the City of Washington, at the coming in of the c
on that day, or as soon thereafter as counsel can be h
upon printed briefs, a copy of which is made and se
herewith.

FRANK DALE,
A. G. C. BIERER,

Attorneys for Appellan

Service of the above and foregoing notice and of mo
and brief attached thereto is hereby accepted this 14th
of January, 1905.

GEO. S. GREEN,
H. B. MARTIN,

Attorneys for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

MOTION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD.

Come now the appellants in the above entitled cause and move the court for an order for a certiorari for diminution of the record in this cause, and for an order upon the Supreme Court of the Territory of Oklahoma to make and certify to this court in this cause a statement of the facts in the case in the nature of a special verdict. The appellants as grounds for this motion show:

That heretofore on the 24th day of October, 1904, the appellants filed their petition in the Supreme Court in the Territory of Oklahoma for an appeal in said cause to the Supreme Court of the United States, and presented the same to the Honorable John H. Burford, Chief Justice of said Supreme Court of Oklahoma Territory, and obtained an order for said appeal and for the issuance of citation and for stay of proceedings therein and for the certification of said cause by the Clerk of the Supreme Court of Oklahoma Territory to the Supreme Court of the United States, said

that regard, they became liable for the remainder of the p
chase price.

Having carefully examined the entire record in t
case, discovering no error therein, and believing that
correct judgment was entered, the judgment of the court
low is affirmed. All the justices concurring, exc
BURFORD, C. J., who tried the case below, not sitting.

UNITED STATES OF AMERICA, }
TERRITORY OF OKLAHOMA, } ss. In the Supreme Co

I, Benj. F. Hegler, Clerk of the Supreme Court of
Territory of Oklahoma, do hereby certify that the above
foregoing is a full, true and complete copy of the opinion
the cause of U. C. Guss, et al plaintiffs in error, vs. J.
Nelson, defendant in error, which opinion was rendered
the 2nd day of September, 1904, at the June, 1904 term
said Court.

In witness whereof, I have hereto set my hand and
fixed the seal of said Supreme Court, at Guthrie, this
day of September, 1904.

BENJ. F. HEGLER,
Clerk Supreme Cou

(Seal)

By Jessie Pardoe, Dep

Your appellants further shows to the court that such cause was tried originally in the District Court of Logan County, Oklahoma Territory, by the court and without a jury, and that no special findings of fact were made in said cause, and that the Supreme Court of the Territory of Oklahoma, in deciding said cause, did not make and set out at any time in said cause any statement of facts in the nature of a special verdict, and that some of the questions raised in said cause by the appeal of the appellants to this court and on which material questions will involve a consideration of the facts of said cause by the Supreme Court of the United States, and that the appellants will, under the law and the practice of said court, be unable to present the same unless a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to shall be made and certified by the Supreme Court of Oklahoma and transmitted to the Supreme Court of the United States, and that justice and an opportunity to appellants to fully present their cause require that such a statement of facts of the case in the nature of a special verdict be made and certified by the Supreme Court of the Territory of Oklahoma and transmitted to the Supreme Court of the United States; that on Nov. 10, 1904, and before the record in said cause was certified by the Clerk of the Supreme Court of the Territory of Oklahoma to the Clerk of the Supreme Court of the United States, appellants filed in the Supreme Court of Oklahoma Territory their application for certification by the Supreme Court of the Territory of Oklahoma of a statement of facts of the case in the nature of a special verdict, a true copy of which application is in words and figures, as follows, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

APPLICATION FOR CERTIFICATION BY THE COURT OF A STATEMENT OF FACTS OF THE CASE, IN THE NATURE OF A SPECIAL VERDICT.

Come now the appellants in the above entitled cause, and show to the Supreme Court of the Territory of Oklahoma that on the 24 day of October, 1904, they filed their petition in the Supreme Court of the Territory of Oklahoma for an appeal of said cause to the Supreme Court of the United States, and presented the same to the Honorable John H. Burford, Chief Justice of said Supreme Court of Oklahoma Territory, and obtained an order for said appeal and for the issuance of citation and for a stay of proceedings therein, and for the certification of said cause by the Clerk of the Supreme Court of Oklahoma to the Supreme Court of the United States, and that the Clerk is preparing a transcript of the proceedings and judgment and decree in said cause to the Supreme Court of the United States, in accordance with the laws of said appeal.

Your apppellants further show to the court that the said cause was tried upon issues joined in the District Court of Logan County, Oklahoma Territory, from whence the appeal was taken to the Supreme Court of the Territory of Oklahoma, and upon said trial, evidence was offered by both parties, but that no special findings of fact and no special verdict was made; that some of the questions raised in said cause, and which questions are material, will involve a consideration of the facts of said cause by the Supreme Court of the United States, and the appellants will under the law and the practice of said court, be unable to present the same unless a statement of the facts of the case in the nature of the a special verdict and also the rulings of the court on the admission or rejection of evidence excepted to shall be made and certified by this court and transmitted to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree appealed from; that justice and an opportunity be given to the appellants to fully present their cause requires that such statement of facts of the case in the nature of a special verdict be made and certified by this court, and transmitted to the Supreme Court of the United States; that this application is not made for the purpose of delay, but in order that justice be done the appellants.

WHEREFORE the appellants pray the Supreme Court of Oklahoma to make a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to, and certify the same and transmit the same with the transcript of the proceedings and judgment and decree appealed from to the Clerk of the Supreme Court of the United States, and that inasmuch as the Supreme Court of the Territory of Oklahoma had adjourned before this appeal was taken, and will not, under the usual practice of said court, and the duties of the judges in their respective districts requiring them to

hold district courts in their respective districts at this se
of the year again be in session until about January 1,
that if said court cannot convene at once for the purpos
making said statement of facts, then an order be mad
the Chief Justice, directing the Clerk of the Supreme
of the Territory of Oklahoma to transmit to the Clerk o
Supreme Court of the United States a transcript of the
ceedings in said cause within the time required by law,
that the said statement of facts of the case in the nature
special verdict be made and certified by the Supreme
of the Territory of Oklahoma as soon as said court
session, and that the same be then promptly transmitt
the Clerk of the Supreme Court of the United States
filed with and become a part of the records and proceed
in said cause.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appel

TERRITORY OF OKLAHOMA; } ss
LOGAN COUNTY, }

A. G. C. Bierer, being first duly sworn, says that he is counsel and one of the attorneys for the plaintiffs in the above entitled cause; that he has read and knows the facts stated in the above and foregoing application and the statements therein contained are true.

Affiant further says that said application is not made for the purpose of delay, but that justice be done the appellants.

A. G. C. BIERER.

Subscribed and sworn to before me this 10th day of November, 1904.

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory

Endorsed:

Filed Nov. 10th, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Application for Certification by the Court of a Statement of Facts of the Case, in the Nature of a Special Verdict now on file in my office in the case of U. C. Guss et al, vs. J. T. Nelson.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,
[SEAL] *Clerk Supreme Court, Oklahoma Territory.*

And that on said date, the 10th day of November, 1904, the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, who had made the orders on the appeal in said cause to the Supreme Court of the United States made an order granting said application, and requiring that said statement of facts be made by the court when it should be in session in January 1905; that on the 6th day of January, 1905, appellants served upon the attorneys of J. T. Nelson, appellee, a statement of facts in said cause in the nature of a special verdict, covering the facts which appellants deemed material in the presentation of their cause in the Supreme Court of the United States, and which they asked the said Supreme Court of the Territory of Oklahoma to make and certify, a true copy of which order and statement of facts, duly certified by the Clerk of the Supreme Court of the Territory of Oklahoma, is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. McNEAL, W. H. GRAY AND FRANK H. GREER,
Appellants.

vs.

J. T. NELSON,
Appellee.

No. 1394

ORDER

Now on this 10th day of November, 1904, come the appellants and made application to the Supreme Court of the Territory of Oklahoma to make a statement of the facts of the above cause in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence as excepted to in the trial of said cause in the District Court of Logan County, Oklahoma Territory, and certify the same and transmit the same to the Supreme Court of the United States, together with the transcript of the proceedings and judgment and decree rendered by the Supreme Court of Oklahoma in said cause, and upon consideration of said application, it is by the undersigned Chief Justice of the Supreme Court of the Territory of Oklahoma considered and adjudged, that,

WHEREAS, appellants' petition for appeal was filed and allowed in said cause to the Supreme Court of the United States on the 24th day of October, 1904, and the same must be filed in the Supreme Court of the United States within thirty (30) days from that date; and

WHEREAS, the Supreme Court of the Territory of Oklahoma adjourned *sine die*, its regular June, 1904 Term of said Court, and the Judges of said Court are all engaged

in holding terms of district court in their respective districts, as by law required, and will remain so engaged until about the 1st of January, 1905, when the Supreme Court of the Territory of Oklahoma will again assemble at the Capital of said Territory in the City of Guthrie, Oklahoma Territory for its regular January session of said court.

IT IS THEREFORE CONSIDERED AND ORDERED that the Clerk of the Supreme Court of Oklahoma Territory do transmit the transcript of the proceedings in said cause and the judgment and decree rendered therein by the Supreme Court of the Territory of Oklahoma to the Clerk of the Supreme Court of the United States within the thirty (30) days required by law, and that when the Supreme Court of Oklahoma Territory is in session in January 1905, the statement of the facts of said case in the nature of a special verdict, and also the rulings of the court on the admission and rejection of evidence excepted to shall be made and certified by said court, and transmitted to the Clerk of the Supreme Court of the United States, to be filed with the transcript of the proceedings and judgment and decree in said cause, as certified by the Clerk of the Supreme Court of the Territory of Oklahoma.

JOHN H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:

BENJ. F. HEGLER,
Clerk Supreme Court of the
[SEAL] *Territory of Oklahoma.*

Endorsed:
Filed Nov. 10th; 1904.
BENJ. F. HEGLER,
Clerk Supreme Court.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the order in the cause of U. C. Guss, et al vs. J. T. Nelson, now on file and of record in my office.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,

[SEAL] *Clerk Supreme Court, Oklahoma Territory.*

March, 1901, and had tendered the same back), notwithstanding the allegations of the answer that they had tendered the property to the defendant in error, and notwithstanding the finding of the court against them on the question of fact involved in this contention, the plaintiffs in error contend that under the law they were not required to return the property, or even to give notice of the fact that they had elected to avail themselves of their option and rescind the contract. This really is the most interesting proposition contended for by plaintiffs in error. The evidence on the part of the plaintiffs in error shows that on the 3d day of March, 1901, the day before their right to rescind expired, they held a meeting among themselves, and elected to rescind; that they instructed Mr. De Bois, their attorney, to notify the defendant in error of their election. A very few days prior to this they had received a letter from the defendant in error, in which he stated that he would hold them to a strict compliance with the contract; that, if they did rescind within the time provided within the contract, they should return him the property, and directed that they return it to Ft. Smith, Ark. It is contended that, inasmuch as the defendant in error, Nelson, did not reside or have a place of business in Oklahoma, but did reside beyond the limits of the territory, all they had to do in order to fulfill the requirements of the law under the contract which was designated that they should return the property to Nelson was that they should simply elect to rescind, and that they were under no obligations either to return the property, or even to notify Nelson of the fact of their election; but, if they are mistaken in that position, that they did in fact notify Nelson of their election, and that the property was at the bank in Guthrie, and that, if they were required to do anything, that this was a sufficient compliance with that provision of the contract which required them to return the property. As stated before, the court found against the plaintiffs in error upon the ques-

tions of fact involved in this contention; that is to say, the court found as a matter of fact that De Bois did not write the letter or send the telegram, and that Nelson did not receive the letter or the telegram that De Bois claimed to have sent. The evidence upon this proposition being conflicting, this court will not disturb the finding.

This leaves the proposition resting upon the contention of plaintiffs in error that under the law they were not obliged to return the property or give notice of the election to rescind, and this because of the fact that the defendant in error did not reside within the territory, and had no place of business therein. Is this contention well taken, and do the authorities cited by plaintiffs in error sustain it? We think not. Each and every authority cited by the plaintiffs in error is based upon a rule of law that has no application to this case whatever. The cases cited by counsel are these: That where A. is indebted to B. upon a contract for the payment of money, made at a certain designated place, and no place of payment is mentioned in the contract, it is payable where made, and when B. resides beyond the limits of the realm—or, in other words, in this case, beyond the limits of the territory—that A. is not obliged to hunt B. up in order to pay him, but that, if he is ready, willing, and able to pay at the maturity of the contract, that is sufficient. We find no fault with the law laid down by the several courts cited by plaintiffs in error, but it is not applicable here. The propositions decided in those cases are not the propositions arising here. Those cases pertain only to questions of payment of simple contracts. They do not involve questions arising under the rights of rescission of contracts, or rights arising on optional contracts or questions arising under the provisions of contracts to return property. In this case the contract was for a sale of the mining stock mentioned and described therein. The delivery of the property together with the payment of $500 completed the

contract, and transferred the title to the plaintiffs in error, subject, however, to the right of plaintiffs in error to exercise their option either of paying the remainder of the purchase price or of rescinding the contract and returning the property. The right to return the property was a condition of the sale. It was a condition subsequent, the performance of which would have rescinded the obligation of plaintiffs in error to pay the purchase price. The performance of the option to return was subject alone to their election. The plaintiff below had no power whatever to prevent or effectuate it. It could only be performed by the voluntary act of the plaintiffs in error. If they failed to perform it, the conditions were discharged, and the promise to pay became absolute. Some affirmative act was necessary on their part in order to complete the recission; that is to say, the contract required them to return the property. The word "return" is very readily understood, and the plaintiffs in error could only be relieved from the obligation to return the property either by some act of the defendant in error or by some condition making it impossible to comply with the terms of the agreement. Stevens v. Hetzler (Ala.) 19 South. 838. The mere fact that the defendant in error did not reside nor have a place of business in the territory was not in itself sufficient to relieve the plaintiffs in error from the obligation to return. The rule of law governing and defining the duties of a party in returning property under an express provision in a contract to return, in optional contracts of this character, is much the same as in cases of recission of contracts where there is a breach of warranty. In the contract in this case, there is an express provision giving the plaintiffs in error the right to rescind, and that right is at the mere option of the parties. In case of a breach of warranty there is an implied right to rescind, which is not optional with the parties, but is conditioned upon the breach of the warranty. The duty of a party to give notice of disaffirmance of a contract,

and to return or offer to return the property, is the same in both instances, except that in cases arising under an implied right rescind the notice and to offer to return must be within a reasonable time, while in this case the time limiting the right to disaffirm, and within which the property was to be returned, is fixed by the contract itself. A & E. Enc. of Law, vol. 24, p. 645, and cases there cited; Carney v. Newberry, 24 Ill. 203; Neal v. Reynolds, 38 Kan. 432, 16 Pac. 785; Jeffries v. Forbes, 28 Kan. 174. The duty to return or offer to return the property and the duty to give notice of the disaffirmance of the contract is not controlled or obviated by reason of the party to whom the notice is due not residing within the limits of the state or territory. Where there is no express provision in the contract providing otherwise, the general rule is that the property shall be returned to the place where it was received when delivered under the contract. There may be some exceptions to this rule, but this case does not fall within the exception. The notice of disaffirmance must be given in both instances, and, as the parties were in communication with each other, and the plaintiffs in error had knowledge of the address of the defendant in error, of course the notice should have been addressed to such place; and, the defendant in error having notified the plaintiffs in error of the point to which he desired them to return the property, a return to such place on or before March 4, 1901, would have been a sufficient compliance with the contract.

It is not necessary to determine, and we do not determine, as to whether or not it was the duty of the plaintiffs in error to return the income from the royalties under the provisions of the option; but it was their duty, in case they elected to rescind, to notify the defendant of such election, and to return or offer to return to the place from which they received it, all of the certificates of stock, books, contracts, seals, and other paraphernalia pertaining to the property and the business. This they failed to do, and, failing in

"IN THE DISTRICT COURT OF LOGAN COUNTY OKLAHOMA, TERRITORY.

J. T. NELSON, *Plaintiff*,

vs.

U. C. GUSS, W. H. GRAY, J. W. McNEAL AND F. H. GREER, *Defendants*.

PETITION.

"Said petition for cause of action against said defendants says that on and prior to the 28th day of May, 1900, said plaintiff was the owner of a large number of shares of the capital stock of the following ten coal companies located in the Creek Nation: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Creek and Broken Arrow Mining Companies, and was in possession having an interest therein of a large number of shares in said companies.

"That he was also on said day a director in each of said companies and secretary of each of said companies and as such director and secretary he had possession of the records, seals and other property belonging to said companies; that the possession of said property was important.

"Plaintiff further says that on said 28th day of May, 1900, he entered into a contract in writing with said defendants to the effect that said plaintff would turn over to said defendants 25 per cent of the capital stock of said companies and would turn over the records, seals, and other property of said companies, including all the records that in any way belonged to said companies; that he would also give said defendant, U. C. Guss, his proxy as director in each of the above named companies or resign as such director.

"Said contract also provided that in consideration of the delivery of said property to said defendants and his resignation as aforesaid, that said defendants would pay him, plaintiff, $500 in cash; the $500 to be considered an option on all of said property until the 4th day of March, 1901 and that on that day the said defendants were to pay to said plaintiff an additional sum of $4,500, or in lieu thereof to turn back to said J. T. Nelson all the property delivered by him to said defendants. A copy of said contract is hereto attached, marked "Exhibit A" and made a part of this petition; reference being made to the terms thereof.

"Plaintiff further says that said defendants paid to said plaintiff the sum of $500 and that said plaintiff duly complied with all of the terms of said contract to the satisfaction of said defendants, turning over to them the stock, records, seals and other property belonging to said companies.

"Plaintiff further says that said defendants failed to return said property to him on the 4th day of March, 1901, and refused to return said property to him but have converted the same to their own use and have failed and neglected to pay said $4,500 on said 4th day of March, 1901, as they were bound to do by said contract. That there is now due from said defendants to said plaintiff the sum of $4,500 with interest thereon from the 4th day of March, 1901.

"Wherefore, plaintiff demands judgment for the sum of $4,500 with interest thereon from March 4th, 1901, and costs.

W. R. BIDDLE &

DOUGLAS & DOUGLAS,

Attorneys for Plaintiff."

The memorandum of agreement heretofore set forth as a part of this statement was attached to said petition as Exhibit "A" and made a part thereof.

17: Thereafter the defendants filed in said court their answer to said petition, which contained, First: a general denial; Second: admission that on the 28th day of May, 1900, the plaintiff was in possession of the shares of stocks, records, seals and other property belonding to the coal companies referred to in plaintiff's petition; that the contract was entered into, as set forth in the memorandum of agreement attached to plaintiff's petition; that the plaintiff turned over and delivered to them the properties mentiond in such memorandum or agreement, the payment of the $500, but alleged that the memorandum of agreement was not intended to present the full and complete contract between the parties, but was merely intended as a memorandum indicating in a general way the nature of the contract; that prior to March 4th, 1901, the date when said contract expired, they notified the plaintiff that they did not desire to make payment of the $4,500, the balance due on said contract, but desired to turn back to plaintiff all of said stock and other property mentioned in the petition, and that they were ready and willing to deliver and turn back said property to plaintiff; that on April 1st, 1901, the plaintiff not having appeared to receive said property, or sending any other person to receive it, and defendants not wishing to be chargeable with the property, expressed all of the shares of stock to the plaintiff at Ft. Smith, Ark., and also wrote said plaintiff inquiring as to what disposition they should make of the books, seals and other property turned over to them by plaintiff; that plaintiff wrongfully refused to take said shares of stock out of the express office and that defendants have at all times been ready and willing to turn said property back to plaintiff, and are now ready and willing to do so, and by their answer tender to plaintiff all of said property. A third defense is also urged, stating and setting forth that the plaintiff fraudently induced the defendants to enter into the contract by representing that all the said leases were in

full force and effect, and that said coal companies had complied with all the requirements of law both of the Creek and Muskogee Nations, and of the Federal statutes, and had also complied with all the provisions and requirements made and prescribed by authority of law and the Secretary of the Interior and Commissioner of Indian Affairs of the United States, and that they had done work and made improvements upon all the lands covered by said leases, and that said companies had prospected for and discovered coal upon all lands covered by said leases; that one of the mines was producing twenty (20) carloads of coal per day; and it is alleged by defendants in their answer that the representations of the plaintiff with reference to the validity and existence of the leases and of the daily output of the Tulsa Mine were false, and made to induce the defendants to enter into the contract; and it is further alleged in the answer that the companies did not have valid and subsisting leases save and except one of nine hundred forty (940) acres, and that all of the leases, if any were in existence prior to the time of making the contract, had expired before such contract was entered into. To this the plaintiff replied by general denial, and the further allegation that the defendants had examined all of the records with reference to the coal companies before they entered into the contract.

18: That on the first day of April, 1901, and within 27 days from March 4, 1901, U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer sent to J. T. Nelson at Ft. Smith, Arkansas, all of the stock, books, records, seals, resignations, and other property of said coal companies which had heretofore been received under said contract mentioned in finding number four hereof by them from the said J. T. Nelson. The said J. T. Nelson declined to receive the same, and returned said articles to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, and said parties have never been asked for said property, or said articles, or any part thereof, by the said J. T. Nelson, and have never re-

fused to turn over or deliver the same to said J. T. Nelson, or to deliver any of the things received by them from the said J. T. Nelson under said contract set out in finding number four hereof.

IN WITNESS WHEREOF I have hereunto affixed the signature of the Supreme Court of the Territory of Oklahoma and duly caused the Clerk of said court to attach the seal thereof hereto this ..... day of January, 1905.

SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

By .....
Associate Justice.

Attest:

.....
Clerk.

Service of the above statement hereby accepted this 6th day of January, 1905.

GREEN AND MARTIN,
Attorneys for J. T. Nelson, Appellee.

Endorsed:—Filed January 6, 1905.—Benj. F. Hegler, Clerk Supreme Court.—By Jessie Pardoe, Deputy.

UNITED STATES OF AMERICA, }
TERRITORY OF OKLAHOMA. } ss:

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Statement of Facts in the Nature of a Special Verdict, now on file in my office in the cause of U. C. Guss et. al. vs. J. T. Nelson.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13th day of January, 1905.

BENJ. F. HEGLER,
(SEAL) Clerk Supreme Court, O. T.

That the said facts presented in said statement are material, and all of them are shown by the evidence in said cause, and the Supreme Court of the Territory of Oklahoma should have found the facts in accordance therewith, or at least should have made findings on said questions, and the facts as thus presented, all appear in the evidence in the case which was presented in the case made in said cause to the Supreme Court of the Territory of Oklahoma, and as appears more particularly and fully in the transcript of the evidence in this cause, certified by the Clerk of the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States, and which is now on file in the office of the Clerk of the Supreme Court, in this cause.

Appellants further show to the court that on the 11th day of January, 1905, the Supreme Court of the Territory of Oklahoma, upon considering said application of the plaintiffs for certification of the statement of facts in the case in the nature of a special verdict, and upon consideration of said statement of facts as presented by counsel for appelants to the Supreme Court of the Territory of Oklahoma, denied said application and declined to make any statement of facts for the reason that the statement of facts made, in the opinion of the court, sufficiently states the facts in said cause, a true copy of the Journal Entry of which judgment of the Supreme Court of Oklahoma, duly certified by the clerk of said court, is in words and figures as follows, to-wit:

IN THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

U. C. GUSS, J. W. MCNEAL, W. H. GRAY AND FRANK H. GREER, *Plaintiffs in Error*,
vs.
J. T. NELSON, *Defendant in Error*.

No. 1394.
JOURNAL ENTRY.

Now on this 11th day of January, 1905, this cause comes on for decision upon the application of the plaintiffs in error in this cause, appellants in the Supreme Court of the United States, for a statement of facts of the cause in the nature of a special verdict, which application was filed in this court on the 10th day of November, 1904, and the court after considering said application, orders that the same be refused for the reason that the opinion rendered in this cause sufficiently states the facts therein, to which ruling and decision of the court plaintiffs in error, appellants, U. C. Guss, J. W. McNeal, W. H. Gray and Frank H. Greer duly except.

UNITED STATES OF AMERICA,
TERRITORY OF OKLAHOMA, } ss.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the Journal Entry of January 11, 1905, in the cause of U. C. Guss et al., vs. J. T. Nelson, as the same remains on file and of record in my office.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 13 day of January, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

(SEAL)

Your appellants show to the court that there are material assignments of error which they have made and filed with their petition for an appeal in this cause to this court and which now appear with the record, as certified to this court, which they cannot present. under the law and the practice of this court, without a statement of facts in the nature of a special verdict; and that justice and equity cannot be done in this cause and the law properly applied thereto and this cause properly presented to this court without such statement of facts in the nature of a special verdict.

Wherefore appellants pray to this court to make an order for a certiorari for diminution of the record in this cause, ordering and directing the Supreme Court of the Territory of Oklahoma to make from the evidence as presented to the Supreme Court of the Territory of Oklahoma, in said cause, a statement of facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence excepted to and certify the same and transmit the same to the Clerk of the Supreme Court of the United States, in order that the same may be made a part of the record in same cause, and printed with the printed record when the same is printed, and that the appellants be in no way prejudiced by the delay in the certification and transmission of said statement of facts in the nature of a special verdict.

Appellants further show that this application is not made for delay, but that justice may be done them.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES.

U. C. GUSS, J. W. McNEAL, W. H. GRAY AND F. H. GREER,
Appellants,

vs.

J. T. NELSON,
Appellee.

No. 1394.

STATEMENT OF FACTS IN THE NATURE OF A SPECIAL VERDICT.

The Supreme Court of the Territory of Oklahoma hereby makes and certifies to the Supreme Court of the United States on appeal in the above entitled cause the following statement of facts of the above cause in the nature of a special verdict instead of the evidence at large therein, and hereby certifies that the facts in said cause are as follows, to-wit:

1: That in the year 1896 the Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Creek and Broken Arrow mining companies were incorporated and organized under the laws of the Creek Nation, in the Indian Territory.

2: That in March, 1896, each of said companies took lease on coal lands in said Creek Nation, of one-hundred thousand (100,000) acres each, except the Tulsa Company, whose lease covered one-hundred twenty thousand (120,000) acres.

3: That in June, 1898, the Tulsa Company sub-leased its properties to the Kansas & Texas Coal Company for a period of five (5) years, in consideration of ten (10c) cents per ton on all coal mined.

4: That on and prior to the 28th day of May, 1900 J. T. Nelson, plaintiff in the court below, was in possession of certain shares of stock and of certain records, seals and other property belonging to said coal companies, and on said date said J. T. Nelson made and entered into a contract in writing with U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, at the City of Guthrie, in Oklahoma Territory, which contract is in words and figures as follows, to-wit:

"Memorandum of agreement made and entered into this 28th day of May, 1900, to-wit, as follows:

"J. T. Nelson agrees on his part to turn over 25 per cent. of the capital stock of the following coal companies located in the Creek Nation, to-wit: Sapulpa, Choctaw, Catoosa, Wewoka, Red Fork, Neyaka, Concharty, Tulsa, Gar Greek and Broken Arrow Mining Companies to the following persons: U. C. Guss, W. H. Gray, F. H. Greer and J. W. McNeal

"The consideration of the delivery under which the above listed stock and other stock as hereinafter described is as follows:

"This also includes the delivery of the records belonging to each of said above named companies, the seals and all other records that in any way belong to any of said companies. A payment of $500 is to be made in cash upon delivery of the above named property and additional property in the way of stock hereinafter listed. The $500 is to be considered an option on all said property until the 4th day of March, 1901. At that date the above named parties are to pay to Nelson an additional sum of $4,500 (Four thousand five-hundred dollars) or in lieu thereof to turn back to said Nelson all the property delivered by him. In addition to the above mentioned 25 per cent. of capital stock aforesaid,

which the said J. T. Nelson represents he owns in his own right, he agrees to turn over and deliver enough more stock to make the aggregate sum of stock delivered under this contract as follows:

Sapulpa - - - - -	1,210 shares;
Choctaw - - - - -	369 shares;
Catoosa - - - - - -	369 shares;
Wewoka - - - - - -	369 shares;
Red Rock - - - - -	369 shares;
Neyaka - - - - - -	368 shares;
Concharty - - - -	369 shares;
Tulsa - - - - - - -	319 shares;
Gar Creek - - - -	368 shares;
Broken Arrow - -	369 shares.

"The $500 above mentioned is to be earnest money to be forfeited in case the balance of payment is not paid. Nelson also agrees to give U. C. Guss his proxy as director in each of the above named companies until such time as it may be convenient for him to resign, and Guss or some one else elected to fill the vacancy.

U. C. GUSS. J. T. NELSON.
W. H. GRAY.
J. W. MCNEAL.
F. H. GREER."

5: That after making and entering into said contract, none of the above mentioned and described leases were ever delivered by the said J. T. Nelson to the said U. C. Guss, W. H. Gray, J. W. McNeal or F. H. Greer, except the sub-lease of the Tulsa Company to the Missouri & Texas Coal Company.

6: That under and in pursuance to this contract Nelson shipped the property described therein, except the leases referred to, by express from Ft. Scott, Kansas, where the headquarters of the company were, to Guthrie, all of the parties being at Guthrie at the time the contract was signed.

7: That under and in pursuance to said contract the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer paid to said Nelson the sum of Five Hundred ($500) Dollars.

8: That at and subsequent to the time when said contract was made and entered into between said parties, the place of residence of said Nelson was at Ft. Scott, Kansas, and also at Ft. Smith, Arkansas.

9: That the said Nelson did not induce the said U. C. Guss, W. H. Gray, J. W. McNeal or F. H. Greer, or any of them to enter into said contract through any deceit or fraudulent misrepresentations.

10: That there was ample and sufficient valid consideration running from the said Nelson to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer for the execution of said contract.

11: That on the 1st day of March, 1901, the said J. T. Nelson addressed a letter to John D. BeBoise, at Guthrie, Oklahoma, wherein he acknowledged a communication from DeBoise of the 26th instant, and one of March 1st from McNeal. In this letter, however, J. T. Nelson stated that he would want them (referring to the appellants herein) to abide by the agreement by either sending the money or the stock, books, seals and resignation of the officers which they had elected. No other or subsequent demand for either the money or the stocks, securities, seals, etc., was ever made by J. T. Nelson, or any person acting for him, upon the appellants herein, defendants below, on or subsequent to March 4, 1901, the date when the contract expired and prior to the commencement of the action below for the recovery of the money.

12: No claim is made by the appellee, J. T. Nelson, that he ever made a demand of any kind upon the appellants for payment of the money or a return of the stock, books,

seals, and the resignation of the officers after the date, to-wit: March 4, 1901, the time fixed in the contract for its expiration, and at which fixed time appellants here, defendants below, should, under the terms of their contract, elect to pay the money or return the properties above mentioned. Neither is it contended by the plaintiff in his testimony or proof that such demand was made.

13: That the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer did never at any time prior to the 4th day of March, 1901, return or offer to return to the said Nelson at the City of Guthrie, Oklahoma Territory, the City of Ft. Scott, Kansas, or at the City of Ft. Smith, Arkansas, or at any other place, the certificates of stock, books, contracts, seals and other paraphernalia pertaining to the property and business of said companies, which under and in pursuence to said contract they had received from said Nelson.

14: That the said U. C. Guss, J. W. McNeal, W. H. Gray and F. H. Greer were on and after the 4th day of March, 1901, ready and willing at all times to return and deliver said property of said companies to said J. T. Nelson at said City of Guthrie, Oklahoma Territory, Ft. Scott, Kansas, or Ft. Smith, Arkansas, or at any other place at which the said J. T. Nelson would accept the same.

15: That upon said stock and property being turned over and delivered to the said U. C. Guss, W. H. Gray, J. W. McNeal and F. H. Greer, they assumed control and management of said property, and were to receive and retain all royalties earned by the said Tulsa Company up until the 4th day of March, 1901, and that they received, in pursuance to said contract, all of said royalties up to said date, amounting to Five Hundred ($500.00) Dollars, and retained and kept the same as between them and the said J. T. Nelson they had stipulated and provided; and all royalties by them received on and after the 4th day of March, 1901, a-

mounting to Three Hundred ($300.00) Dollars were by them deposited in the Guthrie National Bank, at Guthrie, Oklahoma Territory, to the credit of the said J. T. Nelson, and said royalties last mentioned were at all times thereafter subject to the check and claim of said J. T. Nelson.

16; That on the 21st day of September, 1903, the said J. T. Nelson institued his suit in the District Court of Logan County, Oklahoma Territory, against the said U. C. Guss, J. W. McNeal, W. H. Gray and F. H. Greer, by filing therein his petition, which said petition is in words and figures as follows, to:wit:

Supreme Court of Oklahoma Territory did little more in most instances than base its judgment upon the fact that the trial court had heard the evidence in the case and found the issues for the plaintiff and against the defendants. As before suggested, the finding made by the district court was only a general finding. There is nothing presented in record that could be taken by this court as a finding of fact in the nature of a special verdict, or in other words, as special findings of fact. A general finding of all issues against a party certainly cannot constitute a special verdict, and the 1874 act contemplated that there should be transmitted to this court, not a general finding of fact, which would leave this court little if anything to consider, but that the court should certify specifically, separately, and in detail, the facts of the case as presented by the proof, and in lieu of the proof, that this court can say whether the law has been correctly applied thereto.

We very respectfully ask that the court make the order prayed for.

FRANK DALE,

A. G. C. BIERER,

Attorneys for Appellants.